**U.S. Department of Labor**

Office of Administrative Law Judges
Seven Parkway Center
Pittsburgh, Pennsylvania 15220

DATE: JUN 17 1993

Case No. 93-TLC-3

In the Matter of:

JOHN R. FITCH

Employer

Appearances: Michelle Fitch
For the Employer

Annaliese Impink, Esq.
For the U.S. Department of Labor

Charlotte Sibley, Esq.
For Farmworker Legal Services of New York, Inc.,
Intervenor in Support of Denial of Certification

Before: GEORGE P. MORIN
Administrative Law Judge

## DECISION AND ORDER

This proceeding involves a request by the named employer for an expedited *de novo* hearing on the Regional Administrator's (RA's) revocation of his acceptance for consideration of the employer's application for temporary alien agricultural labor certification. The request was made pursuant to the regulation at 20 C.F.R. §655.112(b)(1). The matter arises under the Immigration and Nationality Act, 8 U.S.C. §1101, *et seq.* ("Act") as amended by the Immigration Reform and Control Act (IRCA) and the enabling regulations promulgated thereunder at 20 C.F.R. §§655.90 - 655.113. IRCA amended and recodified as the H-2A Program temporary alien agricultural provision of the Immigration and Nationality Act, 8 U.S.C. §§1101(a)(15)(H)(ii)(a); 1184(c) and 1188. Subsection 112(b)(2) provides that the Decision and Order shall be the final decision of the Secretary.

Under the Act, an agricultural employer who anticipates a shortage of farm labor for a growing season, and who desires to meet any such shortage that may result after efforts to obtain U.S. workers have been unsuccessful, or only partly successful, with temporary, non-immigrant alien workers, may file a documented application with the Secretary of Labor for a certification that:

A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Part of the application package is the accompanying job offer, circulated through the state employment system as a clearance order for U.S. workers describing the job and terms of employment, including pay and working conditions.

On April 26, 1993, the employer ("Fitch" or "the Fitch Farm") filed his Application for Alien Employment Certification, Form ETA 750 (Oct. 1972) which incorporated by reference detailed information required in the Agricultural and Food Processing Clearance Order of the New York State Department of Labor, Form ETA 790 (11-88). These materials were sent to the Regional Administrator, USDOL-ETA, 201 Varick Street, New York, NY. (AF Ex 1, 3)[1] By a letter, undated but conceded to have been sent outside the seven-day period allowed for the RA to reject an application, for the most part in the form prescribed in the H-2A Program Handbook, the RA accepted the application as timely and containing the conditions of employment that will not adversely affect U.S. workers similarly employed. In order to receive the certification sought in the application, Fitch was advised of the steps he must take to recruit U.S. workers. The letter also contained the following paragraph:

This office must approve any amendments to your original H-2A application, such as a change in date of need, number of workers requested or other minor modifications. A request for approval must be submitted in writing. No amendments to the application are effective unless approved by me. (AF-IV)

By letter dated May 13, 1993, the RA informed Fitch that he had revoked his acceptance of the application pursuant to provisions of 20 C.F.R. §655.104, after making a determination that the application does not meet the requirements of 20 C.F.R. §655.102(b)(9)(II(B). The pertinent part reads as follows:

> The specific reason why your application cannot be accepted for consideration is because of the changes that you made in the grade standards as shown in item *11 of the Form ETA 790 that you submitted to this office. Since you have claimed the right to discharge workers that do not meet your grade standards, those standards are governed by 20 CFR 655.102(b)(9)(ii)(B). This regulation requires that, without prior

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[1] AF - Appeal File. Prepared by the Regional Administrator and forwarded to the Chief Administrative Law Judge pursuant to the employer's request for a *de novo* hearing.

approval by this office, such standards shall be no more than those that were approved as part of your 1979 application.[2]

The remainder of the letter contained a listing of Fitch's options, one of which is the *de novo* hearing, available to him should he choose not to resubmit his application within five calendar days of the date of the letter with "corrected information." (AF - Ex. V)

Statement of the Case

The Clearance Order (ETA 790) contains detailed information about the job and living and working conditions and is made available to U.S. workers through the local, intrastate and interstate clearance system. This information forms the basis for U.S. workers to make a determination whether or not to apply for a particular farm job. To this end, the H-2A regulations require that the grower seeking certification must ensure that "wages and working conditions offered are not less than the prevailing wages and working conditions among similarly employed agricultural workers in the area of intended employment or the applicable Federal or State minimum wage, whichever is higher." 20 C.F.R. §653.501(d)(4)

The particular portion of the clearance order giving rise to this proceeding is Section 11, Job Specifications. In that section the duties of the Fitch Farm orchard workers for the approximately five week period before the fruit picking season begins, as well as after picking begins, are described. Beginning approximately August 15, picking of pears and prunes begins, followed by the main crop, apples. Workers are informed that they must meet a productivity standard of 60 1 1/8 bushel boxes for fresh market apples per day, and 80 1 1/8 bushel boxes for processing apples per day. Training is given workers when they begin their employment, whether it is in July, prior to the picking season, in general orchard work, or when the picking season is in progress or just about to begin.[3] While training is going on, the worker's performance is being evaluated and "[on] the first work day following completion of the three day training period, workers not meeting productivity (emphasis supplied) standards will be terminated." AF Ex. III, Attachment No. 5. Further on in the job description, the quoted language appears again, but with the addition of the words "or grade" between "productivity" and "standards." And then the grade standards are spelled out in detail as follows:

Grade Standards:

a) All fresh market fruit apples must be picked with less than 2% injury bruise and meet or exceed U.S. Department of Agriculture coloration standards for U.S.D.A. "Extra Fancy". Standards of coloration will vary by variety of apple.

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[2] Fitch's original H-2 application was filed in 1979.

[3] Although the job specification is confusing on the point, it would appear the workers reporting in July undergo a mandatory three-day training period in general orchard work and, after picking begins, receive another three days of training in picking techniques.

b) All processing apples must be picked with less than 3% injury bruise with a 3$ tolerance for undersized (less than 2 1/2 inches in diameter) apples.

c) All juice apples, including but not limited to drops, must be free of decay and must not include foreign matter such as leaves, twigs, and grass when placed in bulk bins (tote boxes) or other containers.

d) —

e) —

Summarizing the foregoing, on the fourth day of his employment as an apple picker, a worker may be terminated if he is not picking at a daily rate, for fresh market apples, of 60 1 1/8 bushel units with less than 2% bruise rate and meeting U.S.D.A. Extra Fancy coloration standards. Failure to meet any or all of these standards will result in termination.[4] For processing apples, termination will result for failure to pick at a daily rate of 80 1 1/8 bushel units with a less than 3% bruise rate and a 3% tolerance for undersized apples, defined as apples less than 2 1/2 inches in diameter.

Fitch Farm entered the H-2A program (or, rather, its predecessor, the H-2 program) in 1979. Grading standards appearing in its first job order were less than 5% bruise rate and meeting U.S. Fancy color requirements, for fresh fruit apples, and less than 10% bruise rate and 5% tolerance for undersized apples, for processing apples. This grading standard continued in effect and appeared in all job offers for subsequent years through 1992. AF Exh. VI

In his letter of May 13, 1993, the RA informed Fitch that since Fitch claimed the right to discharge workers who do not meet the grade standard, those standards are governed by 20 C.F.R. §655.102(b)(9)(ii)(B) which require that, without prior approval of the RA's office, those standards shall not exceed ("be no more than") those that were approved as part of Fitch's 1979 application. That regulation reads as follows:

(9) Rates of pay. (ii)(B) If the employer who pays by the piece rate[5] requires one or more minimum productivity standards of workers as a condition of job retention,

(1) Such standards shall be specified in the job offer and be no more than those required by the employer in 1977, unless the RA approves a higher minimum; or

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[4] There are also termination procedures spelled out for workers who fail to maintain these standards after meeting them in the training period.

[5] Fitch's 1993 job offer, in Item No. 9, indicates a piece rate for fresh market apples of $.60 per 1 1/8 bushel unit ($.5333 per bushel), and for processing apples of $.45 per 1 1/8 bushel unit ($.40 per bushel).

(2) If the employer first applied for H-2 agricultural or H-2A temporary alien agricultural labor certification after 1977, such standards shall be no more than those normally required (at the time of the first application) by other employers for the activity in the area of intended employment, unless the RA approves a higher minimum.

ISSUES

The ultimate issue in this matter is whether the change in the grade standard, as heretofore described, would impermissibly adversely affect the wages and working conditions of U.S. workers. The more narrow issue is whether the change in grading standards is a change in productivity standards for which the regulations require the RA's prior approval be obtained.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Preliminary Matter

Under the applicable regulations, 20 C.F.R. §655.101(c), the employer shall be notified by the RA in writing within seven calendar days of filing the application if the application is not approved as acceptable for consideration. The government does not dispute the fact that the seven calendar day specification was not met in this instance. In his request for a *de novo* hearing, dated May 17, 1993 (AF Ex. VII), Fitch has chronologized the filing and receipt dates of the various documents involved in this matter. These establish that the RA's acceptance of the filing was sent May 7, 1993, and was received by Fitch six days late on May 10, 1993, and that the revocation of acceptance, sent May 13, 1993, was received on may 14, 1993, fifteen days after the RA received the application. Fitch points out that language in the H-2A Program Handbook, ETA Handbook No. 398, p. I-11, refers to this as a statutory requirement. While this is true, neither the handbook nor the underlying regulations spell out the consequences if the RA fails to meet the established time constraint. The RA appears to have acted promptly when the changes in grading standards were discovered, and there is evidence in the form of testimony in the record to the effect that Fitch did not follow usual procedures to bring the fact that changes were being made in the grading standard to the RA's attention in a separate communication. Moreover, as the parties recognize, being familiar as they are with these densely worded regulations, acceptance of the application does not forever and always tie the RA's hands. Provision is made in the regulations at §655.105(c) for the RA to order modification to a job offer at any time during the period for recruiting U.S. workers if he determines that the job offer does not contain all the provisions relating to minimum benefits, wages and working conditions. So, as a practical matter, the RA could require modification of the job offer to conform the grading standard requirement to Fitch's 1979 H-2A initial filing. In arguing for affirmance of the RA's revocation order, counsel for the Department of Labor stated that if I should reverse the RA's revocation order, "we would just be back here [at an administrative hearing] next week", referring to the provision in subpart (e) of §655.105 for the employer to ask for a *de novo* hearing with respect to determinations by the RA pursuant to this section. In the circumstances, which include the fact that there has been an evidentiary hearing in which all parties were afforded full opportunity to present evidence and argument, it would be wasteful of the court's and the parties' time and resources, as well as unduly delaying of a final resolution of the issues, to terminate this proceeding for the RA's failure to comply with a procedural provision. However,

regardless of the outcome of this proceeding, there is nothing in the regulations precluding the RA from requiring modification to protect the interests of U.S. workers.

Employer's Evidence

Fitch presented, in addition to the testimony of his wife Michelle, who also acted .as the employer's lay representative, certain documentary evidence and the testimony of two other western New York apple growers, the operator of a cold storage and apple distribution facility, and the head of a trade association which promotes the sale of western New York apples in the wholesale and retail markets.

In the western New York State region where Fitch Farm is located, an increasing number of farms, including the Fitch Farm, are planting and harvesting from dwarf and semi-dwarf trees. These smaller trees are easier to pick and tend to produce higher quality fruit, both in size and color. The Fitches produce 40,000 to 50,000 bushels of apples annually on their 250 acre farm, of which 102 acres are given over to production of some 20 different varieties of apples. The quality of the apples grown and harvested is such that 60 percent are sold as fresh market fruit, 30 percent for processing and 10 percent for juice.

Last year (the 1992 growing season), Fitch employed a seasonal work force of 10 men, each of whom worked 60 days. The average worker picked between 100 and 120 bushels per 8-hour day, with some picking as many as 200 bushels in a day. Workers are trained for three days in picking techniques, which include picking bag usage, ladder placement, and most importantly, rapid but careful removal of apples of the proper size and coloration from the trees and their placement in the picking bag. The picker is trained to dump the contents of his bag into the 20 bushel bin assigned to him and placed near the trees in which he is working. Training is done under the supervision of the Fitches, their field supervisor and a tractor driver, two or more of whom are in the orchard with the pickers at all times to answer questions and give instructions. The emphasis is on the production of bruise-free fruit to meet the increasingly high standards of the industry and the demands of the ultimate consumer. Pickers are instructed in a picking technique known as the hand wrap method, a skill described as follows:

> **High degree of Eye-Hand Coordination and Manual Dexterity required to nearly simultaneously reach for apple while scanning for next apple, encase apple in the palm of the hand without using fingertips, and lifting apple while twisting wrist to remove unbruised apple from branch with stem attached to apple.** ERX 2[6]

The witness presented evidence indicating that even with the 5% and 10% bruise standards in place since 1979, Fitch Farm, in 1992, produced fruit ranging from 1% to 2% bruise rate. Mrs. Fitch testified,

[6] ERX - Employer's exhibit.

> "...My problem with the old standard is, the worker isn't informed at application that our standards are much stricter now, because the market requires us to produce a finer product." TR 15

She also asserted that "there was advance notice that the grade standard was going to be changed..." because of her activity throughout the western New York apple growing community in trying to standardize the grade, and that Robert Dietrich, of the New York State Department of Labor (a witness in this proceeding) personally reviewed the Fitch application. The employer's position is that changing the grading standard will have no effect on production because the higher grading standard is already being met, owing to the efforts of Fitch's well-trained workers, both domestic and alien, none of whom has been terminated for exceeding the minimum bruise rate.

In the Appeal File, which was moved in evidence by counsel for the Department of Labor, at AF-VII, the employer's request for a *de novo* hearing contains a statement from Sun Orchard Fruit Company, a western New York apple processor, of its requirements for fresh market apples, including one for fruit with no more than 2% bruising overall. Bucolo Cold Storage states in a May 17, 1993 letter to growers that its policy is 0$ tolerance on bruising.

Robert Brown, owner, along with others in his family, of Orchard Dale Fruit Farms, Inc., Waterport, New York, was called as a witness by the employer. Orchard Dale is an H-2A participant. Its 1992 application for certification included a job offer which specified grade standards for fresh market apples of less than 3% injury bruise and meeting U.S.D.A. Extra Fancy requirements as to coloration. Processing apples had to be picked with less than 5% injury bruise and with a 5% tolerance for undersized apples, described as apples less than 2 1/2 inches in diameter. In 1991, the fresh market apple bruise standard had been 4%. The change to 3% went out in the 1992 clearance order without comment or objection from the RA. Brown noticed no change in productivity from previous years with the higher standard for bruise tolerance in effect. Pickers were paid a piece rate for fresh market apples of $.60 per 1 1/8 bushel unit, with an estimated hourly rate equivalent of $6.30, and for processing apples of $.50 per 1 1/8 bushel unit, equivalent to an hourly rate of $5.75. Productivity minimums for fresh market and processing apples, respectively, were set at 60 and 80 1 1/8 bushel units per 8-hour day. Potential U.S. workers were advised of these requirements and that they could be terminated for their failure to reach and/or maintain productivity or grade standards. Brown testified, however, that no one has been terminated for quality.

George Lemont of Lemont Fruit Farm also testified in the employer's behalf. Lemont Fruit Farm is family owned and consists of 700 acres, 500 of which are used for apple production. The majority of the approximately 80 workers it employs are aliens, but Lemont is not an H-2A participant. (The aliens Lemont employs are qualified to work in the United States. TR 62) Lemont has no production (quantity) standards, but its pickers average 5 20-bushel bins each per day. Lemont closely monitors quality in the field and expects no more than 2% injury bruise rate for fresh market apples.

Jerome Bucolo, of Bucolo Cold Storage, Burt, New York, testified to the ever increasing need for bruise-free fruit to meet stricter industry-wide quality standards. Bucolo, as a commission broker, stores and distributes apples from both H-2A and non-H-2A growers. Fresh market apples, right out

of the orchard, which incur no storage charges, bring $4.00 to $6.00 per bushel. Bruised apples, suitable only for juice production, are sold for $.045 per pound, the equivalent of less than $2.00 per bushel. Finding a home for fruit rejected by the intended buyer for excessive bruising is one of Bucolo's responsibilities and generally involves a monetary loss to grower and distributor.

Employer's last witness was Michael Durando, president and chief executive officer of Western New York Apple Growers, Inc., a non-profit trade organization whose mission it is to promote sales of apples grown in Western New York to existing and potential domestic and foreign markets. This witness is well aware of the need for fruit going on the market to be as bruise free as possible. An important segment of the market are grocery chains whose requirements for high quality fruit reflect the demands of consumers. He knows of instances where a store has "kicked over" (rejected) an entire shipment of apples if an unacceptable amount of bruising is found in just one of 12 apples in a randomly selected sample. The industry is spending large sums on computerized equipment that can sort apples based on size, percentage of color, and, recently, amount of scarring of the fruit. For retail sale in the United States, the U.S.D.A. extra fancy grade is the minimum standard shipped.

Department of Labor Evidence

Robert Dietrich, Director of Rural Labor Services, Community Services Division, New York State Department of Labor, testified on behalf of the government. His job, as he explained it, is to coordinate and implement programs and policies relating to rural labor, an aspect of which is the supervision of the agricultural recruitment program. As such, he and employees on his staff at some 95 offices throughout the state explain to employers seeking state assistance in securing farm labor the various sources and programs they are able to tap into, including (as a last resort, for obvious reasons) the H-2A program. Recruitment is done in four stages: from the local area, within the State of New York, within a ten-state area, which includes Puerto Rico, and in the H-2A program. They explain to employers what is required to appear in a job offer and, in the case of employers paying their workers on a piece rate basis, that they will have to pay an hourly rate equivalent to the Adverse Effect Wage Rate (AEWR), the prevailing wage rate, or the State or Federal Minimum Wage, whichever is higher, when the workers are unable to earn at that rate (for example, when picking apples in a hail-damaged orchard).

Dietrich testified that in 1992, his agency received requests for 2,500 agricultural employees and that of the 900 domestic workers referred, 725 were placed. Among other matters the potential employer is made aware of, besides the AEWR, that must appear in the job offer for acceptance as a clearance order are guaranteeing the worker work on three-quarters of the work days for which he is hired and agreeing to pay transportation costs for the alien worker between his home and the farm employing him. The employer's obligation to do positive recruitment of U.S. workers, over and above the material in the clearance order, is also explained. Dietrich testified that the established bruise rates for apples in western New York has been 5% for fresh market apples and 10% for processing apples since the mid-1970s, when, he recalls, he had to explain to crew leaders in Florida that rough and tumble picking done in orange groves is unacceptable when the crop is apples. In Dietrich's opinion, the lower percentage bruise rate would adversely affect the ability to recruit experienced pickers who would be concerned about their ability to earn money while adhering to such standards. New workers

would not likely be so affected as they would not know the difference. On cross examination, he explained that the fact that he had advanced notice of Fitch's proposal to incorporate changes in grading standards in the 1993 job offer and did not object to them means only that they did not violate any New York laws. Whether such a change is acceptable is a matter for the Regional Administrator at the federal level, and does not come within Dietrich's area of responsibility.

William Flynn, of the U.S. Employment Service, United States Department of Labor, is the federal representative to the New York State Employment Service. The H-2A program in New York operates through his office. The 1993 Fitch job offer and application for a temporary alien labor certification was filed with his office. The application was for two workers in the D.O.T. occupation of Farmworker, Fruit II-403.687-010 to work on the Fitch Farm from July 6 to November 1, 1993. As previously noted, it went through his office without notice being taken of the change in grading standards. When the change was noticed, after the notice of acceptance had been sent out, he issued the revocation letter over the RA's signature. (AF Exh. V) He acknowledges that it was through his oversight that the change was not caught, which would have prevented the acceptance letter from issuing, and that the oversight was a result of the volume of applications being processed that week.

In Flynn's opinion the change in grade standard is a change in the productivity standard, and under the regulations, it should have been separately submitted for a determination of the effect it would have upon U.S. workers' wages and working conditions. Flynn explained that the 60 and 80 1 1/8 bushel units per day requirement is the quantitative part of the productivity standard while the minimum bruise rate is the qualitative part of this standard. The theory behind the requirement that federal approval be given before changes in the productivity standard are made was explained as follows. If a grower is paying a certain piece rate but sets productivity standards so high that the corker cannot pick enough units to meet the AEWR, these reduced wages will affect the wages of U.S. workers who the Act is intended to protect. (TR 149) Flynn feels that his position (quality standards are just another aspect of productivity standards) is strengthened by the fact that they are both standards by which an employee may be terminated and the regulations specifically provide that any change in the productivity standard that can lead to termination must be approved by the RA. 20 C.F.R. §655.102 The number of units picked per 8-hour day (60 for fresh market and 80 for processing apples) is the same this year as it was for last year, but the grade standard, failure to meet which will lead to termination, has been sharply raised by lowering the bruise rates from last year's 5% for fresh and 10% for processing apples to 2% for fresh and 3% for processing. Raising the standard in this manner, Flynn believes, would reduce the U.S. workers' probability of successfully meeting the minimum productivity standard. While he doesn't feel that an employee new to apple picking would be dissuaded from applying for work with the Fitch Farm because of the less than 2% bruise rate, an experienced picker who knows that more careful picking is required to meet the 2% as opposed to 5% bruise rate in effect since 1979, might well be discouraged from applying for a job picking apples on the Fitch Farm.

Intervenor's Position

In its brief *amicus curiae*, intervenor offers a number of arguments why the RA's rejection of the new grading standards should be affirmed. These arguments are all based on the proposition that their acceptance would affect U.S. workers. The higher grading standard would require the U.S.

worker to increase his production as the same number of units (1 1/8 bushel boxes) have to be filled each day but with much greater care being given to not bruising the fruit. Also, the U.S. workers' pay will be reduced since the new quality standard for processing apples is higher than formerly for fresh market, yet the worker is being paid only $.45 per bushel compared to $.53 for fresh market when the bruise rate was 5%. The Farmworkers also argue that the proposed production standards are so "draconian" and impossible to meet as to discourage American workers from applying for these jobs. While Fitch offered no rationale for changing the quality standard when he filed his application, intervenor states, the rationale offered in his appeal letter that a higher quality product is needed to meet the AEWR rate are improper grounds for approval. With respect to Fitch's argument that his proposed increase in quality standards should be allowed because orchard Dale Fruit Farms, Inc. was allowed a similar increase in 1992, the Farmworkers see no basis for changing production standards for all H-2A participants based on an apparent error made in 1912 letting the Orchard Dale job offer go through unchallenged. In summary, the Farmworkers argue that it is fallacious to say that a change in quality standards is not a change in productivity standards since common sense dictates that it is more difficult to meet a 60 or 80 unit per day minimum when more care must be given to how the fruit is picked.

Discussion and Conclusion

Having already determined that the substantive issues in this matter should be addressed whether this be considered a *de novo* hearing pursuant to §655.112 for review of the RA's decision not to accept the application for filing or a *de novo* hearing pursuant to §655.105(e) for review of the RA's decision to require modification of an application already accepted for filing, no further discussion of this matter is necessary.

After careful consideration of the evidence and arguments of the parties, I have concluded that the RA's decision to reject/order modification of the job offer is the correct one and should be affirmed. The employer has advanced several arguments, discussed in detail above, for approving the job offer with the increased grading standard, including keeping in step with technological and horticultural advances and pressures of the marketplace, a *de minimis* argument that since his pickers have in years in the immediate past been meeting and exceeding the proposed changed minimum grading standard, nothing really would change if a higher standard were actually incorporated in the job offer and subsequent clearance orders, and the argument for which I found little support from any of the witnesses that production standards relate to how many boxes or bushels are picked per hour or per day, with which quality standards have nothing to do. The government's argument in support of the RA is that the U.S. worker who reads a clearance order from this western New York grower with a dramatically higher quality standard than ever seen before will be discouraged from seeking employment with that grower.

The horticultural advance most referred to in this proceeding was the trend toward planting dwarf and semi-dwarf trees, which are easier to pick and yield higher quality fruit than do standard trees. It is not clear, however, to what extent this advance has been carried out on the Fitch Farm. There is, then, insufficient support for concluding that a 2% bruise rate for fresh market and 3% bruise rate for processing apples can easily be attained because of the size of the trees being picked.

Mrs. Fitch placed great emphasis on the effectiveness of the brief but intensive training which new employees receive to prepare them for picking a large volume of fruit with minimum bruising. However, the success of this program has been with the lower quality standard in effect. With a new righer quality standard in place, the likelihood increases that inexperienced U.S. workers will fail to successfully complete the three-day training course and will be terminated on the fourth day. The intervenor points out that, as a small grower claiming exemption from the 50% rule, Fitch would be under no obligation to replace U.S. workers terminated on the fourth day with other U.S. workers.

Finally, I am not convinced by the employer's evidence that the change in quality standards is not, in fact, a change in productivity standards which may not be altered without the RA's approval. Unilaterally changing preexisting quality standards in the ETA-750 application is not an acceptable method of attaining the end sought.

Based upon my review of the entire record, I conclude that the employer failed to follow prescribed procedures for effecting a change in quality standard and that the Regional Administrator's action in rejecting the application for temporary alien agricultural labor certification was proper.

ORDER

The Regional Administrator's revocation of the application of John R. Fitch temporary alien agricultural labor certification is AFFIRMED.

GEORGE P. MORIN
Administrative Law Judge

GPM/lab